

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of)
)
Preemption of Local Zoning)
Regulation of Satellite)
Earth Stations)
)
Restrictions on Over-the-Air)
Reception Devices; Television)
Broadcast and Multichannel)
Multipoint Distribution Service)

DOCKET FILE COPY ORIGINAL

CS Docket No. 96-83

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MAY - 6 1996
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

To: The Commission

COMMENTS OF THE NATIONAL TRUST FOR HISTORIC PRESERVATION

Introduction

The National Trust for Historic Preservation submits the following comments in response to the Commission's Notice of Proposed Rulemaking, in the above-captioned proceeding (released April 4, 1996), addressing the proposal to preempt private restrictions that affect the installation, maintenance, or use of television broadcast service (TVBS) and multichannel multipoint distribution service (MMDS) reception antennas.¹

The proposed regulation is a misguided and unwarranted interference with private property rights and contractual rights, and goes far beyond Congress's intent in the Telecommunications

¹ The National Trust has also joined in the comments of the National League of Cities, et al., filed simultaneously, which address the aspects of the proposed rule that would preempt local government regulations.

Act. In fact, we believe this provision would result in a taking of private property under the Fifth Amendment. See Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982). By adopting this intrusive and draconian regulation the FCC would expose the federal government to litigation and claims for damages by property owners who have legal rights under covenants, encumbrances, and other nongovernmental restrictions. We strongly urge you to withdraw the proposed rule.

Interests of the National Trust

The National Trust for Historic Preservation in the United States is a private nonprofit organization chartered by Congress in 1949 to promote public participation in the preservation of our nation's heritage, and to further the historic preservation policy of the United States. See 16 U.S.C. §§ 461, 468. With the strong support of our 260,000 members nationwide, the National Trust works to protect significant historic sites and to advocate historic preservation as a fundamental value in programs and policies at all levels of government.

The National Trust's congressionally chartered powers and duties include the power

[t]o acquire by gift, devise, purchase, or otherwise, absolutely or in trust, and to hold and ... to encumber, convey, or otherwise dispose of, any real property, or any estate or interest therein ... as may be necessary and proper in carrying into effect the purposes of the National Trust.

16 U.S.C. § 468c(f). In carrying out this purpose, the National Trust has acquired over the years not only a collection of historic properties around the country that are open to the public as museums, but also, a much more extensive collection of

historic preservation easements on 75 significant historic properties.

1. The proposed regulation would interfere with established easements and other private property rights.

Easements are contractual agreements through which a property owner grants or conveys an interest in the property to another party, which governs the current and future owners' treatment of the property. Although easements originated centuries ago in common law, easement conveyances have achieved widespread recognition in the last two decades as an important tool for protecting historic properties and scenic open spaces. Almost 1,000 nonprofit organizations and governmental agencies across the country hold easements that protect historic as well as environmental resources. Every state has some form of easement legislation or has otherwise authorized conservation easements. Forty-seven states, including the District of Columbia, allow nonprofits as well state agencies to accept easement donations.

An easement is an actual property interest, which carries with it a set of legal rights and responsibilities. Even though an easement falls short of outright fee simple ownership, the property rights inherent in easement ownership include the right to prevent incompatible physical alterations to the property, which could include the installation of antennas or satellite dishes.

Easements and other types of restrictive covenants are voluntary legal agreements. Owners who enter into such agreements by conveying easements or purchasing property subject

to such restrictions do so deliberately. Often easement programs reinforce local land-use planning goals and community needs, while keeping the property in private hands and on the local tax rolls. It is intrusive and invasive, and represents a dangerous form of federal land use control, for the federal government to override these voluntary private agreements.

Furthermore, tax benefits at the federal, state, and local levels play an essential role in easement donations. Since 1964, the Internal Revenue Service has allowed a charitable contribution tax deduction for the value of the donation of an easement to an qualified easement-holding organization. In 1986, Congress extended the deduction of easement donations to estate and gift taxes. The purpose of this tax deduction is to encourage private preservation and conservation efforts. In order to qualify for the tax deduction the easement must apply in perpetuity. IRC § 170(h). Yet the proposed rule would undermine this federal tax policy by allowing taxpayers who have received financial benefits from the federal government to violate with impunity the legal restrictions on which those benefits were conditioned.

2. The proposed regulation would result in a taking of private property without just compensation.

In Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982), the United States Supreme Court held that the unwanted installation of a cable wire just one-half inch in diameter resulted in an unconstitutional and compensable taking of property by permanent physical occupation. The regulation proposed here would authorize a far greater intrusion on property

rights than the half-inch cable held to be a taking in Loretto; the regulation would allow the installation of TVBS and MMDS antennas on historic buildings or land subject to historic preservation or conservation easements, contrary to and preempting the legal rights of the easement holder. This would result in a physical invasion and thus a taking of the private property rights of the easement-holding organization.

Therefore we believe the proposed regulation would result in a taking of private property without just compensation. This would expose the federal government to litigation by property owners such as the National Trust and other easement holders whose property rights would be abrogated by the regulation.

3. Section 207 of the Telecommunications Act does not require the preemption of private property rights and contractual rights.

The statute simply requires FCC's regulations to "prohibit restrictions that impair a viewer's ability to receive video programming service" Nothing in the legislative history of the Act suggests that Congress intended the FCC to prohibit restrictions that may stem from private property rights or contractual rights. In fact, report language from elsewhere in the bill makes it clear that Congress intended the FCC to interfere as little as possible with the regulatory prerogatives of local governments concerning land use decisions in order to "preserve[] the authority of State and local governments over zoning and land use matters" Conference Report, Telecommunications Act of 1996, Rep. No. 104-320, at 207-08 (Feb. 1, 1996).

The FCC's assumption that it should give less deference to

restrictions founded in private property rights and contracts, as compared with state and local government regulations, is mystifying at best, and suggests that the FCC lacks an understanding of the intrusive and draconian implications of this proposal. Notice of Proposed Rulemaking, at 6 (Apr. 4, 1996).

Conclusion

For the foregoing reasons, the National Trust for Historic Preservation strongly urges the FCC to withdraw this misguided and unconstitutional regulation.

Thank you for considering the comments of the National Trust.

Respectfully submitted,



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May 6, 1996